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CHARLES ELMOR

In the Supreme Court OF THE United States

OCTOBER TERM, 1928

No. 60

THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, and THE CITY OF LOS ANGELES, *Appellants,*

vs.

LOS ANGELES RAILWAY CORPORATION (a corporation), *Appellee.*

STATEMENT OF APPELLANTS RESPECTING JURISDICTION OF COURT TO REVIEW DECREE INVOLVED HEREIN

and

WAIVER OF APPELLEE OF RIGHT TO FILE STATEMENT IN OPPOSITION TO JURISDICTION.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1928

No. 801

THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, and THE CITY OF LOS ANGELES,
Appellants,

vs.

LOS ANGELES RAILWAY CORPORATION (a corporation),
Appellee.

STATEMENT OF APPELLANTS RESPECTING JURISDICTION OF COURT TO REVIEW DECREE INVOLVED HEREIN.

Pursuant to Paragraph 1 of Rule 12 of this Court, appellants present the following statement as to the basis on which this Court has jurisdiction to review the opinion and decree of the District Court of the United States in and for the Southern District of California, Southern Division, involved herein.

A. REFERENCE TO STATUTORY PROVISION SUSTAINING JURISDICTION.

The direct appeal, which is here taken, is authorized by United States Code, Title 28, Section 380 (formerly Judicial Code Section 266). The appeal is from a decree allowing permanent injunction issued by a three judge statutory Court pursuant to proceedings had under said United States Code, Title 28, Section 380.[1]

B. REFERENCE TO OPINION AND DECREE OF COURT SOUGHT TO BE REVIEWED.

The opinion of the District Court (R. 487-506) was filed on September 10, 1928, and the decree allowing injunction (R. 518-520) was entered and recorded on October 1, 1928. Application for appeal (R. 521-522) was filed by appellants on October 2, 1928, and on said date an order allowing appeal was issued and filed. (R. 524-525.) The time within which to file the record and docket the cause in the Supreme Court of the United States was extended from time to time until April 15, 1929. (R. 548-551.)

C. STATEMENT OF NATURE OF CASE SHOWING IT TO BE WITHIN JURISDICTIONAL PROVISION RELIED UPON.

California Railroad Commission was created under the California Constitution, and is vested with power

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(1) (Formerly Judicial Code, Sec. 266), June 18, 1910, c. 309, sec. 17, 36 Stat. 557; Mar. 3, 1911, c. 231, sec. 266, 36 Stat. 1162; Mar. 4, 1913, c. 160, 37 Stat. 1013; Feb. 13, 1925, c. 229, sec. 1, 43 Stat. 938.

and authority to regulate rates and practices of public utilities operating in that state.[2]

The appellee, Los Angeles Railway Corporation, is a public utility street railroad corporation operating in the City of Los Angeles and adjacent territory. On November 17, 1926, appellee filed with appellant Railroad Commission an application for increase in its rates (R. 81-123) from the then prevailing flat rate of five (5) cents to a rate of seven (7) cents with four (4) tokens for twenty-five (25) cents. After conducting exhaustive hearings the appellant Railroad Commission issued its Order 19,521 denying the application, and made the following findings of fact (R. 163):

> "1. That a reasonable rate base to be used for the purpose of computing a fair return upon the operative property of this Company is the sum of forty-two million dollars ($42,000,000).
>
> "2. That the financial results from the operation of applicant's property, under present operating methods. for the year 1927, based upon estimates contained in the record, may be fairly stated as follows:
>
> Total Operating Revenues, $13,254,000.
>
> Total Operating Expense, including depreciation, computed on a 5% sinking fund basis, and taxes, $11,183,739.
>
> Net income available for return, $2,070,261.
>
> "3. That the average annual rate of return earned by applicant for the five-year period ending December 31st, 1926, has been approximately 7.1%.

(2) California Constitution of 1879, as amended by Section 22, Article XII (amendment adopted October 10, 1911); Section 23, Article XII (amendment adopted November 3, 1914); Public Utilities Act of California, California Statutes 1911, Extra Session, Ch. 14, reenacted California Statutes 1915, Ch. 91.

"4. That the rate of return earned by applicant under existing fares and methods of operation for the year ending December 31st, 1927, was approximately 4.9%.

"5. The record shows that the operating methods of the Company might be so changed as to result in large reductions in the cost of operation and still enable the Company to render efficient and adequate service. The management of the Company has made no effort to take advantage of these possible economies which, if made effective, would result in the Company receiving a full and adequate return on the rate base heretofore named, to-wit: the sum of forty-two million dollars ($42,000,000). By reason of these facts, the rates of fare now charged by said Company are not unreasonable.

"6. That the schedule of fares applied for by applicant, to-wit: a seven (7) cent cash fare with four (4) single fare tokens for twenty-five (25) cents, may be reasonably expected to produce a gross revenue of approximately fifteen million seven hundred and eight thousand dollars ($15,708,000), and will, if permitted, produce a net annual return of 9.4 per cent upon the above rate base and the rates applied for, therefore, if put into effect, would be unjust and unreasonable."

Thereafter, appellee filed with appellant Commission an application for rehearing (R. 169) of its said Order 19,521, which application was denied by the Commission by its Order 19,657. (R. 183.) On June 22, 1928, appellee filed with the District Court of the United States in and for the Southern District of California, Southern Division, a bill of complaint against appellant Commission praying that the existing five (5) cent fare be declared confiscatory, that said Commission Order 19,521 be declared void, that said Commission and its officers be enjoined from

enforcing or attempting to enforce said order and for certain other relief. (R. 8-77.) At the same time motion was made by appellee for interlocutory injunction under United States Code, Title 28, Section 380 (formerly 266 Judicial Code). (R. 224.) In the bill of complaint and motion it was urged that the said order of the Commission deprived appellee of its property without due process of law in violation of the Fourteenth Amendment to the Federal Constitution.

The City of Los Angeles, on motion duly made, was permitted to intervene in said proceeding as party defendant. (R. 228-231.) Both defendants, City of Los Angeles and Railroad Commission of California thereupon moved to dismiss said bill of complaint for want of equity, and for other reasons enumerated in said motions. (R. 237-252.) Separate answers were filed by said defendants denying all material allegations (R. 253-328), and affirmatively alleging that plaintiff company was operating under certain franchises granted by the City, and County of Los Angeles, wherein the rate of fare was fixed at five (5) cents per ride, and that the said franchises constituted contracts binding upon said plaintiff, and that said Federal Court was without jurisdiction to grant the relief sought. (R. 281; 291-299.)

Thereafter, the Court, constituted as provided by United States Code, Title 28, Section 380, heard said matters and evidence was introduced by all parties. At the conclusion of said hearing it was stipulated by all parties that the Court, in addition to ruling on said motions, might finally determine all issues in-

volved in the action on the record then before it. (R. 480-482.) Thereafter the said statutory three judge Court issued its opinion (R. 488-506), and on October 1, 1928, issued its decree allowing permanent injunction. (R. 518-520.) In said opinion the Court found the said order of the Railroad Commission to be void on the ground that it deprived plaintiff of its property without due process of law in violation of the Fourteenth Amendment to the Federal Constitution, and on that ground issued its permanent injunction enjoining the enforcement of said Commission order.

Defendants and appellants filed with said Court petition for appeal on October 2, 1928, and on said date order issued allowing appeal (R. 521-525), and bonds on appeal were filed by appellants. (R. 529-534.) Assignment of Errors of appellants was filed on October 2, 1928. (R. 535-547.)

On appeal appellants will urge that the District Court erred in the various particulars enumerated in the Assignment of Errors, and will particularly urge the following points:

1. The Court erred in the issuance of its decree in permitting appellee to charge a rate of fare in excess of the five (5) cent rate fixed in the various franchises granted to appellee by appellant City of Los Angeles. The specifications of error of the Court with reference to the various franchise contracts are set forth in Assignments IV to XIV, inclusive. (R. 536-539.)

2. The Court erred in making its decree and holding that the then existing rates were confiscatory and

in holding that the order of the Railroad Commission, No. 19,521, operates to confiscate plaintiff's property. Assignment of Errors, Paragraphs XV, XVI and XVII. (R. 539-540.)

3. The Court erred in making the decree, and in constituting itself a rate making body by its action of fixing rates and by changing the differential and/or differentials in rates applicable to and between different classes of patrons, for the reason that said Court was, and is limited in its jurisdiction to grant relief against confiscation, and did not possess and does not now possess any rate making power or powers. Errors of the Court in this regard are set forth in Paragraphs XVIII and XIX of Assignment of Errors. (R. 540-541.)

4. The Court erred in making the decree and in holding that the rate of return received by plaintiff during a single year is sufficient evidence upon which to support a finding that the properties of plaintiff are being. or will be confiscated, for the reason that the record before said Court discloses, upon its face, that over and during a reasonable period of years in the immediate past, plaintiff has, and during such a reasonable period of years in the immediate future, plaintiff can and will earn a fair return upon the fair value of the properties devoted by it to public use under its present existing fares. Paragraphs XXIV and XXV, Assignment of Errors. (R. 542.)

5. The Court erred in making the decree and failing to find that the method provided by plaintiff in the management and operation of its street railway

properties might, and could be so changed as to result in large reductions in the cost of operations and maintenance thereby enabling plaintiff to render efficient and adequate service and to immediately receive a fair return upon the fair value of such properties under its existing rates. Paragraphs XXVI, XXVII and XXVIII Assignment of Errors. (R. 543-544.)

6. The Court erred in finding and holding that a rate of return of "not exceeding 8% on the value of operative properties as fixed by the Commission" is proper and lawful, for the reason that a return of 8% on the value of operative properties as fixed by the Commission is unjust and unfair and in excess of the return to which appellee is entitled under the Federal Constitution. Paragraphs XX and XXI Assignment of Errors. (R. 541.)

D. CITATION OF DECISIONS SUSTAINING JURISDICTION.

The following decisions sustain the jurisdiction of this Court to review on direct appeal a final decree granting permanent injunction under United States Code, Title 28, Section 380 (formerly Section 266 Judicial Code):

Arkansas Railroad Commission v. Chicago R. I. P. R. R. Co., 274 U. S. 596, 71 L. Ed. 1224;

In re Wm. Buder, 271 U. S. 462, 70 L. Ed. 1036;

Will Moore v. Fidelity & Deposit Co., et al., 272 U. S. 317, 71 L. Ed. 273;

R. B. Morris v. Wm. Duby, 274 U. S. 135, 71 L. Ed. 966;

Andrew G. Patterson v. Mobile Gas Co., 271 U. S. 131, 70 L. Ed. 870.

All references made herein to the record in this case are to the pages thereof numbered by numbering machine.

Dated, April 17, 1929.

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WAIVER OF APPELLEE OF RIGHT TO FILE STATEMENT IN OPPOSITION TO JURISDICTION.

Appellee, Los Angeles Railway Corporation, hereby expressly waives the right to file a statement in opposition to the above jurisdictional statement as contemplated by Subdivisions 2 and 3 of Rule 12, and hereby concedes the jurisdiction of the United States Supreme Court to review on appeal the judgment or decree below.

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